The Winning Argument

In the

Legal Tender Case of 1884.

Supreme Court of the United States,

October Term, 1883.

AUGUSTUS D. JUILLIARD

VERSUS

THOMAS S. GREENMAN.

Argument for the Defendant in Error.

BY

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THE UNITED STATES HAS SOVEREIGN AUTHORITY IN THE MATTER OF LEGAL TENDER.

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UNITED STATES NOTES ARE LEGAL TENDER.

THIS case arose in this manner: In March, 1879, Greenman bought of Juilliard one hundred bales of cotton for which he agreed to pay in cash on delivery $5,122.90. After delivery he tendered in gold and silver coin $22.90, which was accepted; and at the same time he further tendered a United States note of the denomination of $5,000, and another of the denomination of $100, both of the series of 1878 (as hereafter explained), which tender of notes was refused.

Thereupon, Juilliard sued Greenman, in the United States Circuit Court for the Southern District of New York, for the sum unpaid — $5,100. The defendant pleaded the above tender; and the plaintiff demurred to the plea, for that the facts stated did not constitute any defence to the plaintiff's cause of action. The circuit court overruled the demurrer and rendered judgment for the defendant. Whereupon the plaintiff, by writ of error, carried the judgment to the Supreme Court of the United States for revision.

The case was reached for argument early in October term, 1882; but was allowed to be passed, and did not recover a right to be heard during that term. It stood very early on the list of the following term; but by consent of counsel was assigned for hearing to the first court day in January (1884). Before that day, at the suggestion of the court, counsel consented to submit it upon printed briefs, subject to the call of the court for oral argument.

These briefs were submitted January 2, 1884; a brief for the plaintiff in error, by Messrs. George F. Edmunds, of Vermont, and William Allen Butler, of New York, maintaining in chief the unconstitutionality of the act of May 31, 1878, so far as it attempted to make the notes reissued under it, legal tender, on the ground that Congress had no constitutional authority to make anything to be legal tender save gold and silver coin. For the defendant in error a brief was submitted by Messrs. Thomas H. Talbot, of Boston, and James McKeen, of New York, maintaining that the constitutional authority of Congress in the matter of legal tender was not thus restricted. General B. F. Butler appeared as senior counsel in defence; but after he entered upon his duties as Governor of Massachusetts, he gave up his original intention to take part in the argument.

On March 3, the court, by Mr. Justice Gray, announced its opinion, sustaining the judgment of the court below, and affirming the constitutionality of the act of May 31, 1878, which authorized the reissue of the

notes tendered as legal tender: eight judges concurring in the opinion: Mr. Justice Field alone dissenting.

The brief for the defendant in error thus submitted was condensed from an argument which Mr. Talbot had prepared for oral delivery, and which here follows.

The case presents the question at issue free from all collateral difficulties. This question is: Were the United States notes tendered by the defendant, in payment of a private debt, lawful money of the United States for that purpose?

Certain enactments, which may be followed back to that of February 25, 1862,* in authorizing the issue of notes such as those mentioned in this case, had provided that they should be legal tender in payment even of private debts. In later years, when a portion of such notes had been retired and cancelled, another statute had provided that "it shall not be lawful to cancel or retire any more of the United States legal-tender notes;" "but they shall be reissued and paid out again, and kept in circulation."† The notes tendered in this case were notes reissued and put in circulation under this provision.

The intent of Congress in this enactment is plain; and this intent is all that need be shown in this stage of the argument. Congress intended to forbid the further diminution of the legal-tender notes then in circulation. This intent appears alike in the title and in the enactment. The legal-tender quality is the only quality designated in either place. This enactment meant that the reissued notes should bear that character, if they did not any other. But in fact these notes were to retain their whole original character as preceding statutes had fixed it. If they did not bear this character, what character would they have? Other statutes authorizing notes to be reissued have intended that they should carry in their new issue the character which they had originally borne.‡

* C. 33, s. 1, v. 12, p. 345.

† May 31, 1878, c. 146, v. 20, p. 87.

‡ See December 17, 1860, c. 1, s. 10, v. 12, p. 122; July 17, 1861, c. 5, s. 6, Id. p. 260; February 25, 1862, c. 33, s. 1, Id. p. 345; March 3, 1863, c. 73, s. 3, Id. p. 711.

Indeed, the counsel on the other side, in their brief, do not maintain that the act of May 31, 1878, does not intend that the reissued notes shall be legal tender. They appear to content themselves with asserting the absence of constitutional authority in Congress to make them such tender. They maintain that such authority is wanting, in that Congress has no authority to make anything to be legal tender save gold and silver coin. Whether or not the authority of Congress is thus restricted, is the question at bar.

For the purpose of argument, it is here conceded that this is now an open question. Not that the decision now in force in the affirmative of this question rests wholly, or even chiefly, upon the war powers of Congress, as the other side assume; but rather because, as the plaintiff's brief notices, the full number of justices who in all considered this question were equally divided; and therefore the present members of this court may prefer that so large a question should be argued as only an open question can be.*

The answer to this question must of course be found in what is written in the Constitution of the United States. But those who framed and adopted that Constitution were not living lawless before that time. They and their forbears had, for centuries, been under the dominion of law. They were Englishmen, having the heritage of Englishmen, the system of the common law; and this question of legal tender was not unknown to that system of law.

Indeed, if I do not misunderstand the main position taken in denial of the constitutional authority in question, it is a position at common law. It is that a change in the law of legal tender, operating upon previously existing contracts, impairs the obligation of such contracts.† And this proposition rests upon another, as follows: A contract to pay money is a contract to pay a specified weight of lawfully stamped silver or gold, according to the law of coinage of the date of the contract.

* Legal-Tender Cases, 12 Wall. 457. See, also, Hepburn *v.* Griswold, 8 Id. 603.

† Hepburn *v.* Griswold, 8 Wall. 622, 624, 625; Legal-Tender Cases, 12 Id. 580, 661. See, also, Bronson *v.* Rodes, 7 Wall. 250; Butler *v.* Horwitz, Id. 260.

The question thus raised I propose to consider, without consuming any time in showing that the Constitution does not contain any prohibition against Congress impairing the obligation of contracts. I propose to inquire whether a change in the law of legal tender, operating even upon pre-existing contracts was, at common law, when the Constitution of the United States was adopted, deemed an impairing of the obligation of contracts. This leads me to an examination of the common law in relation to legal tender.

My first proposition is this: —

At common law, judgments for money must be rendered in money of account. This is old English law, as these cases will show.

Very early in the reign of Charles I, Ward sued Bidgwin upon an agreement made at Hamburgh to pay a certain sum of Hamburgh money. The action was debt in *detinet;* and the Hamburgh money was alleged to be of a certain value in English money. The judgment, being for the plaintiff, was conditional; that is, that (1) the defendant should deliver in specie the thing promised, or (2), failing to do that, should pay its value, ascertained by the judgment, in English money.

The question as to the proper form of action was discussed; and it was held that, if the money to be recovered were English money, the form of the action might be that of *debet et detinet*, to result in an absolute judgment for a sum of money, English money, of course. But, if the money demanded were outlandish money, the form must be in the detinet, to be followed by the conditional judgment before stated.*

In fine, the specific money promised could not be recovered in an action of debt, as money, as owed. It could be regained only in an action of detinet, somewhat as chattels may be retaken in our action of replevin. Even in detinet the final compulsory judgment is to be, not for the specific coin promised, but for its value in English, that is, lawful, money.

* Latch, 84; Blackstone's Commentaries, book 3, p. 156.

This case is the more interesting because of the rule which, at first blush, might be raised from the facts and the application of the law thereto; and also because the language of the court seems to lay down the same rule. This supposed rule is that judgment can be given only for money which is legal tender; and that judgment may be rendered in any money which is such tender. Certainly, it appears that the Hamburgh money promised was, at that time, not lawful money of England; and one of the judges expressly says that the form of the action might have been different if the money sued for had been French money, current by proclamation. The interest of this view of the case is that the decisive distinction appears to be between one kind of money which is legal tender, and another kind of money which is not legal tender. Thus, the case tends to sustain that portion of the opinion of this court in the case of Butler *v.* Horwitz* shown in this extract.

"But whether the contract be for the delivery or payment of coin or bullion or other property, damages for non-performance must be assessed in lawful money; that is to say, in money declared to be legal tender in payment, by a law made in pursuance of the Constitution of the United States."

Here the principle of law is stated to be, stated with precision to be, that judgments must be rendered in money which is legal tender. This is a statement which I wish to controvert. I wish to displace it by the more accurate statement that judgments must be rendered in money of account.

To show that this was the rule of old English law, I pass now to a second case, which is also of the seventeenth century. Here, after verdict for the plaintiff,

"It was moved in arrest of judgment, that one of the promises were ill laid, viz. That whereas the defendant was indebted to him in 13*l.* 10*s*, for nine guineas, he promised to pay, etc., and says not nine guineas ad valorem as he ought, the value being not ascertained by proclamation." †

* 7 Wall. 260.

† Dixon *v.* Willoughs, Salk. 446, vol. i.

Here the point is made, that the guineas were not lawful money, their value being not ascertained by proclamation; but this point is at once overruled by Chief Justice Holt, who declares that

"Any piece of money coined at the mint is of value, as it bears a proportion to other current money, and that without proclamation."

Later he speaks of guineas as thus coined, and of their known value. Thus, here the money promised was lawful money; but the declaration did not demand that description of money. It used another expression of money; and Chief Justice Holt tells why. The expression was pounds and parts of pounds, and the pound is recognized by the court as the unit; that is, the unit of English money — the money of account of the realm. The judgment, of course, followed the declaration, and allowed a recovery, not of guineas, but of pounds, when there was no such coin as a pound in existence in England.* Here it is clear that the judgment was to be rendered, not in money which was mere lawful money, but in money of account.

Let us see what is the significance of money of account, if its denominations denote specific weights and purity of stamped silver or gold. It is not so deemed by writers on this subject. For the purpose of obtaining a clear statement, I quote, expecting to show that the course of law sanctions the statement which I quote. The book is from the pen of Stephen Colwell, of Philadelphia, now deceased, issued in 1859, before any occasion had arisen to consider practically the question now at bar. He says: —

"Every coin or weight of gold or silver [he really means the name of every such coin], used for any long period as the means of expressing prices or amounts, becomes the unit of a money of account, and is used abstractly and arithmetically. It becomes quite as capable of expressing changes in the value of the precious metals as of any other articles; for it remains fixed at the value at which it passed into money of account." †

*The Ways and Means of Payment, p. 130. † P. 82.

"The value of the unit, or beginning-point, being once firmly fixed in men's minds by constant use, remains there wholly independent of subsequent changes of price which may affect the specific article from which it took its rise. Thus, if it spring from a coin, or a certain quantity of gold or silver, it becomes afterwards so independent of these as to be quite capable of expressing the changing prices of that or any other coin." "The naming a price with them (commercial people) is not naming a coin, or any specific quantity of gold or silver; but it is the employment of the denominations of money of account which all understand, to express a price."*

Certainly, money of account is not, as thus defined, a specific weight of precious metal.

The next question is as to the material in which a judgment, thus rendered in money of account, may be paid. But it follows of course, it would seem, that payment in any particular description of money cannot be required on a judgment which does not designate any particular description of money.

The discussion, then, may consider what would constitute good payment under a contract calling in terms for the payment of money of a particular description. This was the question raised in Wade's case,† decided as long ago as in the 43 Elizabeth. There the condition was to pay "pounds lawful money of England" ("legalis monetæ Angliæ"); and the tender was, in part, of Spanish silver, not pounds, which tender was held good, because "the said Spanish silver so tendered was lawful money of England," having been made current by proclamation in the previous reign of Philip and Mary.

This decision more clearly establishes the principle, which must be inferred from the decisions previously cited; to wit, that, at common law, a contract to pay even a particular description of lawful money is not to be literally construed, is not a contract to pay that, or, in fact, any description of money; but is a contract to pay merely a given sum in lawful money, all lawful money being of known value, as Lord Holt recognized.

* P. 33. † Coke's Reports, part 5, p. 114.

Therein lies the fact which makes a difference, a wide difference, between money and other articles — commodities, as they are often called. The law does not know the value of these commodities. Where the parties have contracted for wheat, it cannot recognize wine as its equivalent. But it does know the value of all lawful money; it can determine how far coins of one name, sovereigns, for instance, are equivalent to coins of another name, say, dollars. For the value of all lawful money, whatever it may be to the mind of the intelligent, wise legislator, is, in the eye of a court of law, conventional, a creature of the statute, as in the course of this argument will be more fully illustrated.

If judgments are to be rendered in mere expression of money, in distinction from any particular description of tangible money, it follows that it is no part of the duty of the court rendering the judgment to determine in what material the judgment shall be paid. A judgment in money of account must leave that question open.

Can the determination of that question have reference to the date of the original contract between the parties? Without discussing now how far the principles which I am presenting are mere English, in distinction from American, law, it is well to take note how far they depend upon what obtains with us to-day as much as it ever obtained in England. As practised among us now, the question of what shall pay a judgment cannot be determined by reference to the date of the contract which the judgment is rendered to enforce. For the reason, plain enough, that such contract no longer has any legal existence; it has been swallowed up, merged, as the expression is, in the judgment. The judgment exists as of its own date and of no other. It does not even recite the date of the contract on which it is rendered, which contract or contracts may indeed have no single date, but may be of different days of origin. Still less does the writ of execution, which is the officer's warrant for collecting what will satisfy the judgment. That merely commands the collection of so much money, expressed, as in the judgment, in money of account, that is,

the amount of the judgment, also the costs and interest to the day of collection. The only significant date for the present purpose, known on the face of the execution, to the creditor, officer, or debtor, is the last-named day, the day of collection. If the execution calls for pounds and parts of pounds, the only question which can arise on that paper is what constitutes a pound on this day of its demand or tender. True, this is a technical fact, but it is not a superficial fact. It is grounded in our modes of proceeding at law, and cannot lightly be changed. So it was of old, at common law; and the mode of proceeding which then caused it to be so, is to-day as it was then.

This principle of the common law, namely, that whatever was legal tender at the time of payment would serve to discharge a contract, was not displaced by a change made in the law of legal tender between the date of the contract and the time of the payment. Whatever was legal tender at the latter time would suffice to discharge the contract, even though the contract were made in the time of a better currency. The debased currency called pollards, made lawful tender in the reign of Edward I, answered to discharge, according to their legal value, as of the day of payment, an obligation to pay pounds sterling, though the legal value seems to have been imparted to this debased currency after the date of the contract.*

In thus interpreting this decision, I confess to leaning somewhat upon the marginal note. But whatever doubt may be thrown upon my interpretation of this case, there is no such cloud cast over the next case I shall cite. This is the justly celebrated case of "The Mixed Money,"† decided in the second year of James I. It surpasses all other early English cases in the fulness of its consideration of the principles involved. Here it is plain that the change was made in the currency after the parties had entered into contract. The obligation of the defendant was

* Pong *v.* De Lindsey, found in Dyer's Reports 82 b, vol. i, reported in 6 and 7 Edward VI. † Davies (Irish), 48.

given in April, to pay, "at the tomb of Earl Strongbow, in Christ Church, Dublin," "pounds sterling, current and lawful money of England;" and it was not until the twenty-fourth of May, in the same year, that the proclamation was issued making a change in the currency of Ireland. In accordance with this proclamation, all other money which had been current in that kingdom was, after June 10, to be cried down and annulled, and a certain mixed money was to take its place as legal tender. Here,

"Sixthly and lastly, it was resolved that, although at the time of the contract and obligation made in the present case, pure money of gold and silver was current within this kingdom where the place of payment was assigned; yet the mixed money being established in this kingdom before the day of payment, may well be tendered in discharge of the said obligation, and the obligee is bound to accept it."*

The application of this rule to a special case may be noticed here, especially as the case has relation to an American case hereafter to be cited.

If the tender were well made, well maintained, and well pleaded, the tender would be held good notwithstanding a crying down of the money tendered, after tender and before trial. In Barrington *v.* Potter, the coin tendered was cried down after tender and before trial; but the plea was that "the defendants always were, and still are, ready to pay said 24*l.* 13*s.* 4*d.* in the pieces aforesaid called shillings after the rate, etc."; and the plaintiff took the money at the rate aforesaid, without costs or damages.†

Such being the common law as administered in the courts of England from the earliest times, between man and man, the inquiry follows, what was the constitutional law between the state and the people upon the closely related subject, that of legal tender? Upon what constitutional law did these principles of the common law rest? Or, at least, what constitutional law did this state of the common law imply? In relation to legal tender, what power had the sovereign of England? Where this sovereign authority, at any given

*Davies, 73. †6 and 7 Edward VI, Dyer 87 b.

time, resided, whether in the king or in parliament, I need not consider. In a land

> "Where freedom broadens slowly down
> From precedent to precedent,"

a power once wholly in the king might pass to parliament by insensible gradations, leaving a period in which it was uncertain where it was; and the removal of such uncertainty would minister nothing to the present discussion. It is enough for the purposes of this argument to show that an absolute, unlimited power over the subject-matter of legal tender was, of old, as it still is, an attribute of the sovereignty of England. This appears in this cited "Case of Mixed Money," in which, quoting authority as old as the reign of Henry I, and expressly sustained by the decision of Wade's case in the reign of Elizabeth,

> "it was resolved that, as the king by his prerogative may make money of what matter and form he pleaseth, and establish the standard of it, so may he change his money in substance and impression, and enhance or debase the value of it, or entirely decry or annul it, so that it shall be but bullion at his pleasure." *

Later the opinion declares that

> "this prerogative is allowed and approved, not only by the common law, but also by the rules of the imperial law." †

That is, this prerogative has existed wherever law existed, — any system of law from which our law takes succession. It is a fact, I may say, to the contrary of which human history, written or unwritten, runs not.

This decision was made prior to any permanent English settlement within the limits of what afterwards became the territory of the thirteen independent American States. These are the rules of the common law, and this the principle of constitutional law which, a few years later, the first settlers of Virginia brought across the Atlantic and established as authority on the banks of the James, and which,

* P. 55. † P. 59.

later, came with other settlements to other parts of our country. Theoretically and presumably this became American law, by the English settlement of America. But there is no need to rest on theory or presumption in our opinions upon this subject. The English-Americans very soon began to make laws of their own as between man and man, and as between the state and the people; and what was done in that regard may be learned.

Over a matter so scientific and abstruse as that of money of account, it would not be strange if no colonial legislation had occurred. It might have been left to be regulated by actual practice. Indeed, I have seen it more than intimated that this subject was never directly regulated by statute, anywhere, until the United States so regulated it.* Yet something like such regulation appears in the history of the second colony, that of Plymouth. Her act of June 7, 1666, provided

"that all debts shall be payed in the specye for which a man doth agree, and that all damages which shall arise according to the judgment of the court upon occasions of debt, defamation, or treaspas shall be paid in any good current Country pay at prise current." †

Of course, judgments, which were to be paid in any currency whatever, could not be rendered in any particular description of currency. They must have run in mere expression of money — in money of account, in distinction from "the specye" of the contract, in which the debt was to be paid before judgment, according to the same provision. But, beyond its implied provision with reference to money of account, the direct import of this statute is of great weight in this argument. It orders how judgments shall be paid; that is, "in any good current Country pay, at prise current," as though the matter were at the unrestricted control of the lawmaking power of this little colony, this incipient American State. This act was passed but little more than sixty years after the "Case of Mixed Money" had been decided

* The Ways and Means of Payment, p. 141.
† Plymouth Colony Laws, p. 149.

in Ireland. Men might then have been living in Plymouth, who were living in England when that decision was rendered. Thus promptly was the main doctrine of that decision incorporated into American law; and the constitutional prerogative which that decision had recognized in the kings of England, even in such sovereigns as were the Henrys and the Edwards, was asserted and exercised by the lawmaking power of the colony of Plymouth. It cannot be maintained, in view of this American legislation, — and there was enough more like it, as will appear, — that this constitutional prerogative is a part merely of English institutions; it is emphatically American law.

The later colony, which afterwards absorbed that of Plymouth, that of "The Massachusetts Bay in New England," exercised this royal prerogative of debasing the coin, even earlier than the date of this Plymouth enactment. A Massachusetts statute of 1652, while immigrants were still leaders in her affairs, while John Endicott was "Gouernour" and the first Dudley was "Deputy Gouernour," only a few years after Winthrop's early death, directed a coinage of "twelve pence, six pence, and three pence pieces," which John Hull, master of the mint, was, "for value, to stamp two pence in a shilling of lesser value than the present English coyne," which was to be "acknowledged to be the current coyne of the commonwealth, and pass from man to man in all payments accordingly." *

While these colonists, being still Englishmen, thus asserted this English prerogative, it does not appear that their descendants, twice, and even thrice, born as Americans, were any the less fond of it. They varied its exercise only by giving to it an American form. They made it apply to paper money.

In 1741, the Province of Massachusetts passed "An Act to ascertain the value of money and of the Bills of publick Credit of this Province granted this present year," in which it was provided

*Records, vol. iii, p. 261.

"That the Province Bills emitted for the supply of the Treasury this present year shall be valued and taken at the Rate following, viz: Every Bill of six shillings and eight pence at the rate of one ounce Troy of coined sterling silver Alloy, and all other Bills of said emission at the same proportion." *

North Carolina enacted a like statute in 1748. Chap. 10, sec. 12.

Without stating any more similar instances, from the period when these American colonies acknowledged their subjection to the English crown, I refer to the opinion of Mr. Justice Story in Briscoe *v.* Bank of Kentucky, for a full statement of this matter of history.†

There was certainly no holding back in this respect after these colonies had declared themselves to be independent States. It will be enough for me to cite a few instances, it being well known that all the States took similar action in this matter.

New Hampshire, even the day before the signing of that Declaration of Independence, made paper a legal tender; a refusal to accept it, according to a later act, to "be construed in law as a total extinguishment of all and every such debt due and demand." ‡ Within three months thereafter New Jersey legislated to the same effect. § Pennsylvania used another phraseology. What her statute made legal tender, was to "be received in payment and discharge of all manner of debts, rents, sum or sums of money whatsoever, due or hereafter to become due, payable or accruing upon, or by reason of, any mortgage, bond, specialty, bill, note, book account, promise, assumption, or any other contract whatsoever." "any clause, proviso, or device in any bond, note, or other instrument of writing to the contrary thereof, in any wise notwithstanding." ‖ And Maryland followed this model.¶

* Perpetual Laws, 1692-1745, p. 295.

† 11 Peters, 333.

‡ Laws of New Hampshire, July 3, 1776, Nov. 18, 1779, in Cong. Library.

§ New Jersey Laws, App. p. 3, Sept. 20, 1776.

‖ Passed Jan. 29, 1777, Penn. Stat. vol. i, p. 7.

¶ Hanson's Laws of Maryland, 1763-1784, 1777, ch. 9.

Here let me state that I have examined the original Constitutions of all the original thirteen States without finding therein any provision, a single provision, conferring legislative power over the currency. These States, then, must have exercised this as an inherent power of government. I make the same statement of the earliest Constitutions of the same communities — their charters from the kings of England. The prerogative which the judges in Ireland found attached to the sovereignties of Europe was asserted by American governments as they came into being. These American governments exercised this prerogative under circumstances raising the strongest evidence that it was such an inherent power; that is, under written Constitutions whose written terms did not confer it.

Here the consideration has come down to the time when a National Constitution is to be found, that of 1777, forming the States into a confederacy, with Congress as its supreme authority. At present I shall do no more than call the attention of the court to the actual administration of this first National Constitution in relation to the matter in question. This action is an ascertainment of the value of the bills of credit then in circulation, all of them, those issued by the several States as well as those issued by the general government. This was done on March 18, 1780, in an act authorizing a new issue by the general government, to this effect: —

"That silver and gold be receivable in payment of the said quotas at the rate of one Spanish milled dollar in lieu of forty dollars of the bills now in circulation." "That the said new bills be receivable in payment of the monthly quotas (of old bills issued in part by the States) at the same rate aforesaid of specye." *

Later this action may be further considered. At present it is introduced merely to complete a showing that all the American governments, which existed prior to the establishment of the present government of the United States, actually treated paper money as lawful money.

* Journal, vol. iii, Aug. 1, 1778, Mar. 31, 1782, p. 442.

Now, let me state what were the powers in relation to this matter of the currency, which the Constitution of 1777 conferred upon the Congress which it created; and immediately thereafter let me present the similar powers with which the Constitution of 1789 has invested the lawmaking power of the United States. Of the early American Congress the powers were conditional, and were these: —

1. "To borrow money and emit bills on the credit of the United States." *

2. "To regulate the alloy and value of coin struck by their own authority or by that of the respective States." †

They were conditional, in that they were not to be exercised "unless nine States assent to the same." ‡ Also, and the fact is quite important for the present discussion, there was no prohibition on the States to coin money, emit bills of credit, or in the matter of legal tender. Then, this Constitution, in its second article, laid down the rule for its own interpretation, by which each State was to retain every power not expressly delegated to the United States. Under the Constitution of 1789, on the other hand, Congress has absolute power: —

1. "To borrow money on the credit of the United States."

2. "To coin money, regulate the value thereof, and of foreign coin." §

Instead of these powers being dependent upon the assent of any number of States as before, they are absolute, as has been stated; and also, from the States are taken away these powers which before had been allowed to them, to coin money, to emit bills of credit, and make anything but gold and silver coin a tender in payment of debts. ‖ Then, this instrument has this for its rule of interpretation, namely, that to the States respectively, or to the people, are reserved only the powers not delegated to the United States, nor prohibited to the States. ¶

* Art. IX. † Art. IX. ‡ Art. IX.
§ Art. 1, sec. 8.
‖ Art. 1, sec. 10.
¶ Amendments, Art. X.

Here, before I pass to a discussion of these constitutional provisions, let me invite attention to a less hackneyed question. When the Constitution of 1789, with the above provisions relating to the currency, had gone into force, where was the authority deposited to regulate the matter of money of account? With regard to this matter the Constitution is silent.

One would suppose that the several States might establish, each, its own money of account for its own accounts and proceedings. Grant that; could they then determine what money, coin or paper, would satisfy the call of that money of account? To make paper money such satisfaction would be to make something other than gold and silver a tender in payment of debts; and to make gold and silver coin such satisfaction at any rate fixed by State authority would be an ascertainment of the value of money; both acts on the part of a State being in violation of the National Constitution. Thus, there was no power left in the States over the matter of legal tender, though, by the ordinary rules of interpretation, full power over a tender of gold and silver would be held to have been left. More complete control over the matter of the currency had been carried to the United States than at first sight would appear. No substantial power was left, even, in the matter of money of account. In fact, the whole control over the currency had been taken from the several States and carried to the United States. As has already been shown, this control over the currency carried with it, of its own capacity, as a part of its contents, authority — all authority — over the matter of legal tender. This authority was a necessary incident: it was more: it was a constituent part of that control. It was of its substance and essence. It is so by admission in argument.* Past all doubt, none of this authority was left in the several States. It had been taken from them by positive grant to the United States; and, further, by express prohibition upon themselves. When this argument considers provisions of

* Legal-Tender Cases, 12 Wall. 469.

the Constitution in their direct bearing upon the question at bar, this grant of power to the United States will be further considered: at present the consideration is of money of account.

There was to be, as is well known, a uniform national currency; and, accordingly, there must be a uniform national money of account. Congress must be allowed really to initiate and shape all legislation upon this subject. This is what has been done. Congress first legislated in relation to money of account; and the States copied its legislation so as to make it the law of the respective, as well as of the United, States. Certainly this was the course of Massachusetts. That State, in 1794, copied into its enactment the phraseology of the earlier statute of the United States; and the other original States appear to have legislated in the same manner.* The legislation of Congress upon this subject was quite an early piece of Federal legislation. It is to be found in the last section of the coinage act of 1792.† Is not this legislative connection of this matter with coinage to be taken as an indication that, in 1792, the power of Congress over money of account was supposed to come through the constitutional provision relating to the coinage?

But, though thus connected, it can be made to appear that the subjects are two, and not one and the same subject. Indeed, there was earlier legislation than this of 1792 upon the subject of money of account. Our money of account is older than our coinage, older, even, than our Constitution. It came down to us from the Congress of the Confederacy. It was established by a resolve of July 6, 1785, with the dollar as its unit, when there was no United States dollar in existence, and without any direction as to what should constitute a dollar. ‡

* See opinion of Mr. Justice Clifford in the Legal-Tender Cases, 12 Wall. 576.

† April 2, chap. 16, sec. 20, v. 1, 246; R. S. sec. 3563, title 37, p. 707.

‡ The Ways and Means of Payment, p. 141. Report of Messrs. Osgood and Livingston, April 8, 1786, in relation to a mint.

Let me recite the substance of this enactment of 1792. It is: —

"That the money of account of the United States shall be expressed in dollars or units," and in the decimal parts of a dollar, "and that all accounts in the public offices, and all proceedings in the courts of the United States, shall be kept and had in conformity to this regulation." (Vol. i, p. 250.)

Does not this section reaffirm the rule of the common law as I have presented it, that judgments must be rendered in money of account and nothing else? Does it not re-establish the practice of the time of Lord Holt, when judgment was rendered in the abstract denomination, pounds, and not in the actual coin, guineas? Has it any direction to give about the payment of the public accounts or of the judgments of the courts of the United States? Does it mean to declare that no account and no judgment shall be paid save in the coin named therein? By no means. It has no mandate about payment.

The difference between money of account and money of actual payment is a wide difference. Let me illustrate. There is a large manufacturing house or company in Boston which does now, or did not long since, as I was informed, keep the pay-roll of its workmen in pounds, shillings, and pence: say in English money, when Boston has been independent of English authority for more than a century: so permanent a thing is this money of account. Yet that by no means implies that those workmen shall be paid in that currency. Those wages, thus expressed in English or provincial currency, if sued for, must be recovered in dollars. There is Massachusetts law express to that effect, and has been since 1794. When that State re-enacted the twentieth section of our national coinage act, she followed it with this explanatory section: —

"SECTION 2. Nothing contained in the preceding section shall vitiate or affect an account, charge, or entry made, or a note, bond, or other

instrument expressed in any other money of account: but in a suit thereon such other money shall be reduced to dollars and parts of a dollar." *

Those wages, thus recovered in dollars, may of course be paid in dollars, and also in whatever the law of the United States has made the equivalent of dollars; and they can be lawfully paid in nothing else.

Thus it becomes plain that the denominations of the pay-roll mentioned have no reference to the money of payment. Neither does this twentieth section of the original coinage act. It fixes simply in what denominations of money the judgment shall be expressed. The expression shall be dollars and parts of dollars.

And did not this section intend that there should be uniformity of expression in all the public accounts and all the judicial proceedings of the United States? How can there be such uniformity, if the meaning of the word "dollars" is not simple and single? Its meaning cannot be single if this section recognizes varieties of dollars, and allows several shades and differences to be expressed in accounts and proceedings. In different accounts and different proceedings would be bad enough. But the variance from unity would not stop there. These differences would creep into the same account, and huddle themselves together in the same judgment. If this section allows any qualification of the word "dollars," we are liable, in the course of events, to have judgments reading generally to this effect: —

It is considered by the court that the plaintiff recover of the defendant as follows: To wit, one hundred dollars in gold coin, of the coinage of 1792; a like sum of the coinage of 1834; five dollars in silver, of the coinage of 1873; one hundred dollars United States notes, issued under the act of 1862, and perchance a like sum issued under the act of 1878.

How would interest on these different kinds of money be reckoned? Of course, on each in its own kind. Might not every change in the coinage find recognition and place in our

* R. S., chap. 17, sec. 2, p. 436; G. S., chap. 53, sec. 2, p. 292; R. S., chap. 35, sec. 6, p. 307; 1794, chap. 42, sec. 2.

judgments? Is it not clear that this enactment contemplates no such destruction of uniformity, no such creation of confusion as this would be? I submit that it intends no addition whatever to the prescribed word "dollars." Its purport is that the expression shall be dollars and parts of dollars, and nothing more. When those words are written, its requirements are fulfilled, and, more, its authority is exhausted.

In fine, this enactment forbids accounts to be kept and proceedings to be had in specified coin; in any variety of currency whatever. It requires all judgments to be rendered in money of account.

This construction is not mere matter of personal inference; it has the sanction of positive enactment. In the term of this court which began in December, 1864, a decision had been given, authorizing a judgment to be rendered payable in coin (of silver or gold).* The case was a strong one to sustain a judgment in such form; for the demand in suit was for duties on imports, and, by law, these were payable in coin only. But Congress refused its sanction to such a form of judgment. By an act of March 3, 1865, it directed that judgments for duties on imports should simply recite that they were such, and that then they should be payable "in the coin receivable by law for duties." † In no other way could an efficient judgment be rendered, which would be consistent with the undisputed control of Congress over *this* matter. For Congress might at any time make paper currency receivable for duties due to the government, duties past as well as future; and when it should have done this, a judgment calling for coin would have had no lawful support. There is another and later instance of the sanction by Congress of the view now presented. In 1873, the lawmaking power exercised its constitutional authority to regulate the value of foreign coin, as occurring in the computations of the custom-house. And the value of such coin was fixed "as expressed," not in coins, but "in money of account." ‡

* Cheang-ke *v.* U. S., 3 Wall. 320. † Ch. 80, vol. xiii, 495.
‡ March 3, 1873, c. 268, s. 1, v. 17, p. 602. R. S., sec. 3564, p. 707.

Now, how may such judgments, under the Constitution and laws of the United States, be paid? May they be paid, as under the common law, in whatever is legal tender at the time of payment? This ought to result from their being rendered in money of account. Such a judgment, on its face, designates no specific coin. Nor will it be contended that the word "dollars," which it contains, refers solely to what may have been dollars when the judgment was rendered. If it did, then a judgment rendered while the coinage act of 1792 was in force would be payable only in the coin authorized by that act; and so with reference to later changes of the coinage. It cannot be that officers charged with the duty of collecting debts upon executions, must accept only what was lawful money at the date of the judgment. The more correct statement is that the judgment and execution use the word "dollars" abstractly, that is, without defining its material meaning. For its meaning at any time, we must look to the law for that time regulating the currency. So long as the coinage of the United States was governed by the law of 1792, so long that law gave meaning to the word "dollars" in judgments and public accounts. When a subsequent enactment defined the currency anew, the new definition was accepted, even by the old judgments. If this be so, a judgment under the Constitution and laws of the United States is to be paid in whatever those laws for the time being declare to be lawful material of payment, — in shorter phrase, lawful money, legal tender.

But the question of how judgments under the Constitution and laws of the United States may be paid, is too important to leave the answer to mere inference. Let us ascertain how the Constitution itself, by means of legislation which it authorized, or how, it may be, similar earlier legislation on the part of the States, operated upon pre-existing contracts to pay money of a particular description. Such legislation found, already made and still in force, contracts to pay paper money. The case of Faw *v.* Marsteller* affords one

*2 Cr. 10.

instance of this fact. The contract had been made in Virginia, in 1779, to pay Virginia currency, that currency being, as then known to the law, paper money. When that case, involving the question which I am discussing, reached this court, it found a Virginia jurist occupying the seat which your honor now so worthily fills; and it was by his lips that the court gave its opinion, which was that, at common law, as in force, before and under the Constitution, that contract had now become a contract to pay gold or silver.*

There is another case arising and also decided in the same State.† This case is especially interesting because in its facts it is parallel to an old English case.‡ A seemingly slight difference is to be found in the two pleadings; and by a very sharp construction of the pleadings the American case is brought to a result directly the opposite of that reached by the English court, which held that a tender well made and maintained was still good although the money tendered had, after tender and before plea pleaded, been cried down by law. In this case, not only was the agreement to pay paper money, but also in 1781, while this paper money was still, according to law, Virginia currency, a tender of payment in that currency had been made, and had been maintained to 1790, when it was pleaded, and thence on to the time of trial; the defendant bringing, as his plea stated, "said sum of money" into court ready to be paid to the plaintiff. The English case of the pollards was considered by the court, and would have been followed, had the pleadings here tendered the same issue of fact, that is, had the defendant averred that he brought *said sort of money* which he tendered, that is, had he pleaded the legal character of the money as of the date of the tender. Then the court would have held the plea true in fact. But here his averment was that he brought "said sum of money," which plea the court held to

* See pp. 29, 31.

† Downman *v.* Downman's Ex'rs., Washington Rep. 1, 26 (Va.).

‡ Barrington *v.* Potter, Dyer 81 b.

relate to the present time, and, on inspecting the money, found not to be true: that which was produced in court not being money, when examined during the hearing. The defendant in the English case relied upon the character of the money tendered as of the time of tender, and prevailed. In the American case the debtor was held to have put in issue the character of the money as of the time of trial, and thus lost his case.

Thus it appears,—and it is a great fact in this discussion,—that when the Constitution of the United States went into effect through the legal tender act of 1792,* every existing contract to pay paper money in the United States was transmuted into a contract to pay gold and silver. If such a transmutation is an impairing of the obligation of contracts, the Constitution itself, in the very act of becoming the supreme law of the land, in this matter, worked such an impairing. In becoming an operative Constitution, it did that which very high authority has declared to be, in substance and spirit, unconstitutional.†

Here the first portion of my argument draws towards its close: the introductory portion. It has been very long, certainly. I am happy to say that what is to follow will be proportionately short. It is a long introduction; but I believe it has been successful in establishing as follows: Neither at common law, nor under the statutes of the United States, is a contract to pay a stated sum of lawful money, no matter how specifically described, a contract to pay a specific weight of lawfully stamped silver or gold. The common law never so understood the meaning of such a contract. It was always without the means of enforcing such a contract so understood. The legislation of Congress upon this subject has simply adopted the rules of the common law: has simply turned the unwritten common law into enacted statute.

* V. 1, c. 16, s. 20, p. 250.

† Hepburn *v.* Griswold, 8 Wall. 622, 625.

Such a contract is answered by whatever is lawful money at the time of payment, although it may not have been lawful money at the date of the contract. This rule is not a rule of English law merely. It is American law, as existing both before and after the adoption of the present Constitution of the United States. Indeed, if any difference has appeared between English and American law in this respect, the American case goes beyond the English case in applying the principle here asserted. In point of fact, the American court differed from the English court in rejecting a tender good when made, because not good at the time of trial.

Accordingly, it seems impossible to maintain that a change in the law of legal tender, operating even upon pre-existing contracts, impairs the obligation of those contracts. Certainly it was not such an impairing as understood by the common law in England, when that law there ruled those who afterward became the people of the United States. Nor was the rule of that common law upon this subject changed when these people here made a law unto themselves. They kept right on, straight on, in the course of the old country. The new Constitution and the new statutes under it, grew, as it were, to the old; they accepted its principles and administered them, as though the English in America understood that the old law of England was a part of their inheritance. They did so understand. This law upon the subject of legal tender, as I have asserted it to be, was publicly understood.

It happens to be a matter of record in this court, that this principle of law was popularly understood in this country when this country was not, but when it contemplated becoming, "a land of settled government." Let me read from the case of Faw *v.* Marsteller as stated by Marshall, Ch. J.

"In the month of May, 1779, the executors of John Alexander set up to the highest bidder, on a ground rent forever, certain lots of land lying in the town of Alexandria. One of these lots was struck off to

a certain Peter Wise, at the rent of 26*l.* per annum current money of Virginia." *

"It was proved in the cause, that the contracts made by the executors of John Alexander excited at the time very great attention, and were the subject of general conversation. The prevailing opinion among the bidders was that the rents would be paid in paper money so long as paper should be the circulating medium, after which they would be paid in specie. Such, too, was the opinion of Peter Wise, the purchaser of the particular lot which occasioned the existing controversy, and there is reason to suppose it was also the opinion of those who were disposing of the property." †

Thus, this law, as I have presented it, was understood not only by the distinguished Virginians who sat as jurists upon this bench, but also by their undistinguished fellow-citizens, the plain people of the neighboring city of Alexandria. There, the business men bought and sold at auction, and made long contracts, upon this understanding.

This, then, was the common law upon the subject of legal tender when the Constitution, now to be discussed, was formed. Then, there had existed from long before, and was still existing, a constitutional law, which had never left some previous government over the same people, without unlimited authority to make money of what substance and form it pleased. Also this law, common and constitutional, was then publicly understood. All these, this state of the common law, and this pre-existing constitutional law, and this popular understanding of the law, all together, are to be taken as the matrix in which was laid the new National Constitution. These are the previous conditions out of which the provisions of that Constitution grew. It is from these pre-existing facts, and with them in mind, that we ought to pass to the consideration of these provisions, as I now respectfully invite the court to do.

Here let me recapitulate further.

There is a preliminary inference to be drawn from what has already been shown. A little out of its regular order this argument has pushed forward beyond the time of the

*P. 10. †P. 12.

adoption of the Constitution of 1789, to inquire into the legislation under that Constitution. Thus, it has already been made to appear that the law on this subject, as between man and man, as it was in England, is the law of the United States. In England that law between man and man rested back upon a certain constitutional principle as between the state and the people. The presumption is that a similar law in the United States has a similar basis. The law as to the rendering and satisfaction of judgments in England rested back upon an unlimited authority in the sovereign over the matter of legal tender. The like law in the United States may be assumed to rest upon a like authority.

Then, this argument, thus far, has made at least this ground for the affirmative side of this question in the Constitution itself. No prohibition against Congress making a paper legal tender could be raised by implication, even out of a provision that Congress should make no law impairing the obligation of contracts, if there were such a provision in the Constitution.

It has done more. It has shown that a discretionary, unlimited authority in the matter of legal tender is an inherent attribute of sovereignty; not merely of sovereignty European and monarchial, but also of sovereignty American and republican. If a sovereign government has come into being, the presumption arises with its sovereignty, that it possesses this power. Even in a partition of the attributes of sovereignty between two governments, there arises no presumption of the destruction or loss of this power. Its destruction or loss must be proved. It should be proved against any other government, as under our Constitution it may be proved against the governments of the several States, by plain, unmistakable, constitutional provisions to that effect. If, in our Constitution, no such restricting provisions, no such prohibitions upon the government of the United States, can be shown, then this government must possess this power, possessing, as it does, the general power and authority to which this power belongs as a particular part. If, in the

partition of powers between the state governments and the general government, the power over the currency, of which authority in the matter of legal tender is an intrinsic portion, has been set over to the United States; then the United States must be held to have unlimited authority in the matter of legal tender: that is to say, in the absence of all restricting provisions: if no prohibition upon the United States can be shown.

There is no such prohibition. The learned counsel for the plaintiff can show no such prohibition bearing upon Congress. The Constitution does contain a prohibition against making a paper legal tender. Thereby it shows that it knew the appropriate language of prohibition, and could use it where there was occasion for its use. It declares in language as forbidding as the Roman word "*veto*": "No State shall make anything but gold and silver coin a tender in payment of debts." But it does not say: That shall not be done by Congress. It has no prohibition, like that upon the States, running against Congress. It has no prohibition touching this subject running against Congress, none whatever. The rest of my argument will go along with that assumption.

I propose now to consider what positive power over the currency the Constitution has conferred upon Congress. I hope so to conduct this examination as to show that there is in that instrument no room for the implication of such a prohibition: that it cannot be found even in any want of fulness of powers granted, any narrowness of authority conferred, any cautious withholding of that which would be necessary to carry it. On the other hand, I trust that I shall show that authorities have been conferred upon Congress which cannot be properly exercised: that duties have been imposed upon that body which cannot be fully performed, without the possession of this discretionary power in the matter of legal tender: that the full benefits, which the Constitution intended and purposed, cannot be reached, unless the government of the United States is invested with this inherent attribute of sovereignty.

The first proposition in relation to the Constitution of the United States, which I wish to submit, is this: The authority of Congress is unlimited over the Constitutional currency, whatever that may be. Certainly, Congress may coin and regulate the value of money at its discretion. Whatever material the Constitution regards as lawful substance of money, Congress has unlimited authority to determine the denominations and value thereof.

I do not wish in this connection to deny that Congress has a duty properly to ascertain the values of the coins which it authorizes. Certainly, that duty lies upon the National Legislature. But has any other department of the government been authorized to enforce the performance of that legislative duty? Has this court any authority to draw the coinage to a true standard, when Congress establishes one that is incorrect? It is the duty of Congress to lay a judicious tariff. But can this court determine that a tariff laid by Congress is injudicious, and, by decision, proceed to bring in a true revenue reform? By no means. Nor can suitors, before any judicial tribunal of the United States, invalidate, upon the testimony of experts, the currency of the United States, issued by authority of Congress. Indeed, there is expert assertion that the readjustment made by the act of 1834 was itself erroneous: that it should have been made, not by diminishing the weight of the gold coins, but by adding to the weight of those of silver. If this assertion were substantiated, would its substantiation invalidate the gold act of 1834? Certainly not. The regulation of the value of even a metallic currency is at the unlimited discretion of Congress. Constitutionally, that body may make metallic money of whatever value it sees fit; and such money must be treated as of its statute value in this tribunal.

Silver is constitutional material of legal tender. That statement is undisputed. So far as the Constitution is metallic, it is certainly bimetallic. Yet Congress has forbidden silver to be legal tender*; and the constitutionality

* February 10, 1873, c. 126, sec 15, v. 17, p. 427.

of this congressional action is undoubted. This helps illustrate the proposition which I am maintaining, that Congress has unlimited authority over whatever is constitutional material of currency. It may make and unmake it to be legal tender, as Congress, in its discretion, sees fit.

My second proposition is that paper money is such constitutional currency. This proposition is supported by more than one decision of this court; but the decision to which I first call the attention of the court is a decision made as recently as December term, 1869, in the case of the Veazie Bank *v.* Fenno.*

This was the case: The Veazie Bank was a corporation chartered by the State of Maine, with authority to issue bank-notes for circulation. This bank thus existing, Congress by law provided "That every" "State bank" "shall pay a tax of ten per centum on the amount of notes of any" "State bank" "used for circulation and paid out by them after the first day of August, 1866."† And the tax thus authorized was duly assessed on notes of this bank issued under the authority of the State of Maine, as before stated. The bank declined to pay this tax, alleging it to be unconstitutional; and that was the question which came before this court for decision.

The opinion was given by the late Chief Justice (Chase). I need not notice it except where it is related to the present discussion. Its historical recital in this portion starts from "the beginning of the Rebellion,"‡ when this was the condition of things which the opinion desires to make prominent.

> "There was, then, no National currency except coin: there was no general regulation of any other by National legislation; and no National taxation was imposed in any form upon the State bank circulation."‖

The opinion then goes forward to recite the intermediate

*8 Wall. 533.
†13 July, 1866, c. 184, sec. 9, v. 14, p. 146.
‡P. 536.
‖P. 537.

measures of national legislation which had completely changed this condition of things; and thereafter and therefrom raises this conclusion: —

"It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. It is not important here to decide whether the quality of legal tender, in payment of debts, can be constitutionally imparted to these bills: it is enough to say that there can be no question of the power of the government to emit them: to make them receivable in payment of debts to itself: to fit them for use by those who see fit to use them in all the transactions of commerce: to provide for their redemption; to make them a currency, uniform in value and description, and convenient and useful for circulation."

"The methods adopted for the supply of this currency were briefly explained in the first part of this opinion. It now consists of coin, of United States notes, and of the notes of the National banks." *

(That is, the present constitutional currency so consists.) From this recital the opinion later proceeds: —

"Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation." †

It is from this point that the opinion reaches the decision of the case before it. But it is not this decision that pertains to the present discussion. It is only with the ground on which it was made to rest that this argument has to do. That ground was, as these extracts show, that Congress was authorized, in the exercise of undisputed constitutional powers, to provide a currency for the whole country: this currency to consist, in large part, of paper money, of treasury notes, and of bank bills.

That there was dissent from the opinion in this case, that of Justices Nelson and Davis, ought not to be overlooked. Let me say, then, that the dissent of these distinguished

* P. 548.
† P. 549.

jurists does not affect the use which I am making of this decision. The dissent was not from the view taken by the majority, which I am citing. It was, on the other hand, a dissent merely from the conclusion which the majority drew from that view. The dissenting opinion denied that authority in Congress to provide a paper currency carried with it authority to tax the currency of the State banks out of circulation. It did not deny congressional authority to provide such currency. On the other hand, it admitted it, expressly, by its reference to the decisions which sustained the constitutionality of a national bank.*

Furthermore, the constitutionality of a national paper currency was affirmed again, and by the same eminent jurist, the late Chief Justice, in the case of Hepburn *v.* Griswold; and here Mr. Justice Nelson concurred in the opinion which asserted such constitutionality, while the other dissentient in the case of Veazie Bank *v.* Fenno, Mr. Justice Davis, went beyond him in his assent to such constitutionality. He went with the minority in the latter case, who affirmed, not merely the constitutional authority in Congress to provide a paper currency, but the further authority to make such paper legal tender. The language in which the late Chief Justice affirms the authority of Congress over a paper currency is worthy of especial attention. In the first case he names it as one of "the undisputed constitutional powers" of Congress.† In the later case he makes the sweeping assertion: —

"No one questions the general constitutionality" "of the legislation by which a note currency has been authorized in recent years." ‡

This is language which the late Chief Justice would not have used had the opposite opinion been entertained by two, or even by one, who sat with him upon the bench.

Then we reach the result that, at the December term,

* Pp. 550, 551.
† P. 549.
‡ P. 619.

1869, with all the difference that prevailed among the members of this honorable court in regard to the extent of the power of Congress over a paper currency, there was no difference whatever about the authority of Congress to provide such currency. With regard to that this court was then unanimous. The court might well be unanimous to that effect then. This court had always been unanimous that far. In 1819, the question came before this court in the very celebrated case of McCullough *v.* Maryland,* whether Congress had authority to incorporate a national bank, to issue bank bills which should be used as currency; and in these words the opinion is given: —

"After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land." †

Five years later this construction of the Constitution was unanimously reaffirmed in the case of Osborn *v.* the United States Bank.‡

Indirectly, but no less effectively, this doctrine is asserted in another series of cases, commencing with the also celebrated case of Briscoe *v.* Bank of Kentucky. Here the question was whether a State could incorporate a bank which should issue bills or notes to serve the purposes of currency. That a State could do this was the opinion of the court, the unanimous opinion, I am going to say; for the dissenting opinion of Mr. Justice Story does not dissent from this statement. On the other hand, he gives to it his express assent.‖ And the authority of this case has been followed in three subsequent cases.§

Upon what did this decision, thus subsequently affirmed,

* 4 Wh. 318.
† P. 424.
‡ 9 Wh. 738.
‖ 11 Pet. p. 348.
§ Woodruff *v.* Trapnall, 10, H. 205; Darrington *v.* Bank of Alabama, 13 Id. 12; Curran *v.* Arkansas, 15 Id. 317.

rest itself? The State had this power, said the court, because the State was sovereign. The language is: —

"This power is incident to sovereignty." *

If this is a power incident to sovereignty, then these four opinions unite with the two decisions before cited in reference to the constitutionality of a national bank, in attributing this power to the government of the United States, which is as sovereign as any and each of the several States. The harmony between these two series of opinions is close. In McCullough *v.* Maryland, Ch. J. Marshall asserted the sovereignty of the United States in order to take the benefit of the principle that the creation of a corporation appertains to sovereignty.†

After these decisions is the case of Veazie Bank *v.* Fenno, where the authority of Congress to provide a paper currency is directly in question and directly sustained; and this decision is reaffirmed in Hepburn *v.* Griswold.

In the face of these decisions, eight in all, running through a period of fifty years (1819–1869), none of them in this respect overruled or even questioned, there would seem to be no opportunity for doubt that the Constitution of the United States sanctions the establishment by Congress of a paper currency. I assume this proposition of constitutional law as indisputable.

And if paper money is constitutional currency, wherein does it differ from constitutional currency of any other variety? Wherein does it differ in the eye of the Constitution itself? There is no doubt that the Constitution might put a difference between two kinds of currency, both of which it allowed; but it has not. And in the absence of any such difference, Congress has the same power over all the varieties of constitutional currency. It may make and unmake each and all of them to be legal tender, at its discretion.

* P. 317.
† 4 Wh. p. 410.

But if Congress has constitutional authority to provide a paper currency, the source of that authority in the Constitution may be found. The provisions which confer it may be shown; and an examination of these provisions ought to throw some light upon the question whether the authority is conferred with or without the restriction in question.

This authority may be traced to one or more of four different sources: 1. The power to regulate commerce: 2. The coinage power: 3. The authority to emit bills of credit: 4. The prohibition on the States to make a paper legal tender.

Let us consider, first, the power which touches the matter in hand, least specifically, which, so far as it affects the currency, affects it only as incidental to its own direct and intended subject. I refer to the power to regulate commerce with foreign nations and among the several States.*

This power has been thought to involve an implied power in Congress to provide a paper currency for the whole country. Mr. Webster regarded it as the "strongest" and "broadest" ground (the adjectives are his own) on which to place the authority and duty of Congress in the provision of such a currency. The opinion of this court in the case of Veazie Bank *v.* Fenno is more authoritative in the same direction. It declares that Congress is authorized to fit the bills of a paper currency for use "in all the transactions of commerce."

Now, the most important transaction of commerce involving the use of currency to be regulated by law is, plainly enough, the discharge of obligations, the payment of debts, their lawful discharge. True, commerce can make use of some currency which will not avail in such lawful discharge. But, also, it must have some currency which will thus avail. It must have something which is lawful money. In commercial transactions a legal tender is indispensable. Certainly, it is as indispensable as telegraphic communica-

* Art. I, sec. 8.

tions; and this court has found these latter to be subject to the control of Congress, as instruments of commerce.* If, then, the Constitution has authorized Congress, as a necessary measure toward the regulation of commerce, to issue a paper currency, it has authorized Congress to give any legal character to such currency which commerce requires; and of what will serve the purposes of commerce, Congress itself is the judge. It would be difficult to believe that the duty to provide a currency for the purposes of commerce was laid upon Congress, if the power over the matter of legal tender had been by the Constitution left elsewhere — where it had been before — in the several States. The authority to issue a paper currency as an instrument of commerce carries in itself the authority to make that currency lawful money in payment of commercial obligations.

The next source of authority under consideration is the coinage clause, that which gives Congress the power "to coin money, regulate the value thereof, and of foreign coin." † This provision substantially was brought over from the Constitution of 1777. There, however, it is to be found conferred by more restricted phraseology, as already has been shown. ‡

The word "struck," there used, would seem to refer to the working of metal; and thus, as tending to show that nothing was within the aim of this provision, save metallic money. But, in fact, a statute of Pennsylvania had used the words "striking bills of credit;"‖ and Maryland had used substantially the same expression. § Certainly the word "alloy," there used, has no meaning in connection with paper money. It refers to metallic currency alone, and not to a representative currency.

But under this clause, with these restrictive words, Congress had proceeded, as has before been stated, to ascertain

* Pens. Tel. Co. *v.* W. U. Tel. Co., 96 U. S. 1.
† Art. I, sec. 8.
‡ *Ante*, p. 18.
‖ Penn. State Laws, vol. i, p. 374.
§ Mr. Southard in arguing Briscoe *v.* Bank, p 321, "In 1769."

the value of a paper currency. It is true that that Congress had one express power, which is not to be found expressly granted to the Congress of the United States. That was the power "to emit bills on the credit of the United States." That body proceeded, however, to ascertain the value, not alone of bills which itself issued, but also of bills issued by the respective States.* This piece of legislation cannot be assigned to the authority to emit bills of credit. It must fall under the power to ascertain the value of coin. Thus, language narrower than that of our present Constitution had, before 1789, received a construction so broad as to include paper money.

The word "money" in this clause, relied upon to restrict its meaning to metallic, — to hard, — money, is used in two other places in the same instrument, where it must have a broader meaning. † The power of Congress "to borrow money on the credit of the United States" must include whatever is actually used as money in the transactions of commerce. Also, the provision, that "no money shall be drawn from the treasury but in consequence of appropriations made by law," ‡ must cover treasury notes in the treasury as well as coin. Indeed, it must include all the varieties of constitutional currency as they are stated in Veazie Bank *v.* Fenno; to wit, coin, treasury notes, and bills of national banks.

Nay more, the word "coin" itself is sometimes used as including other varieties of money. When Congress, in 1865, enacted that judgments for duties on imposts should be payable "in the coin receivable by law for duties," was not that provision intended to include paper money, whenever paper money should be so receivable? ||

A case may be supposed, entirely business-like and probable, which will show this to be the true construction of this

* *Ante* p. 17.

† See argument of Mr. Attorney-General Akerman in Legal-Tender Cases, 12 Wall, 520.

‡ Art. I, sec. 8.

|| V. 13, p. 495.

coinage clause as it now stands. I will suppose a case under that specification of this clause, where a narrower interpretation would be most appropriate and most imperative. That is the specification which gives to Congress the power to regulate the value of foreign coin, the last specification of the clause. If this specification extends beyond coin, it extends so far as to include all the currencies of the world.

The case to be supposed is that contracts are made for the payment of notes of the Bank of England, which notes are lawful money of that foreign country. These contracts come into the American courts for enforcement. How, in our courts, is the value of the denominations of those notes of the Bank of England to be ascertained? Has Congress no authority to declare at what rate they shall be reduced to dollars and parts of dollars? Certainly, it has. It must have! So important a matter as that has not been omitted from our Constitution. And, if Congress has the authority to say how contracts promising to pay foreign paper shall be enforced in our courts, it has this power under the coinage clause. Then, this coinage power includes, where it is narrowest, a power over paper money.

This point does not rest in mere supposition. Congress has exercised the authority supposed. This was done very early, in 1789, within six months after the Constitution went into effect. The first act of congressional legislation under the coinage clause is to be found in the first Chapter V of the Statutes of the United States. It is a fixing of the value of the "pound sterling of Great Britain," * when there was no such foreign coin as the pound sterling of Great Britain: when such pounds sterling existed in pound notes only, in paper money.

Not only did Congress extend its action beyond what was coin, in this instance; but it plainly expressed its intention so to do. It asserted its authority so to extend it. In the list of denominations of foreign money which it proposed to

* July 31, c. 5, s. 18, v. 1, p. 41; Aug. 4, 1790, c. 35, s. 40, Id. p. 167; Mar. 3, 1873, v. 17, p. 602.

estimate, it mentioned the pound sterling of Great Britain first. But also the list has a general heading which states the purpose of introducing the list. This heading is, so to speak, the enacting clause of the whole section. It declares that something "shall be estimated according to the following rates." And what are to be so estimated? Foreign coins alone? No! But "all foreign coins and currencies." The first Congress was not content to value foreign coins alone. It went beyond mere coins to act upon foreign currencies. This is the opening of the section; and the section closes its list of particulars with the sweeping words, "all other denominations of money." Here plainly and unmistakably Congress asserted its authority to ascertain the value of foreign paper money: in logical effect to make the Bank of England notes legal tender in the United States.

Now, if it be that the coinage power in the Constitution covers a paper currency: if it brings such a currency within the constitutional authority of the lawmaking power of the United States: the extent of that authority would seem to be clear. It is an authority to coin paper money and to regulate the value thereof. Either of these powers is a power to make legal tender. The coinage power alike of the English king and of American Colonies and States was a power to make lawful money. And the ascertaining by legislation of the value of money is the fixing of the rate at which money shall be paid and received in the enforcement and discharge of legal obligations. If this coinage clause confers any authority and imposes any duty to provide paper money, does it not confer the authority, and impose the duty, to regulate its value? Does it not authorize paper money to be coined, that is, made lawful money?

In Veazie Bank *v.* Fenno, the court unhesitatingly speaks of the bills of national banks and of treasury notes, as bills of credit. The authority to issue them is, in some parts of that opinion, rested upon an authority in Congress to emit bills of credit, which is spoken of as "settled by the uniform practice of the government and by repeated decisions."

Now, there is no doubt that the power to emit bills of credit, as practised by American governments older than the government of the United States, included the power to make them legal tender. It is sometimes suggested that, as there are in the Constitution separate prohibitions on the several States against the emission of bills of credit, and in the matter of legal tender, the two subjects are entirely distinct. The more accurate statement, however, of the relation of these two constitutional provisions I take to be that given by Mr. Justice Nelson in the case which I have just now mentioned, when he says that the intent was, first, to abolish State bills of credit entirely; and, second, to prevent any other paper money from being made legal tender by the several States.* In other words, the prohibition to emit bills of credit† applies to those bills whether they are, or are not, legal tender. Or rather, it certainly applies to them, when they assume to be such tender. It would seem that the authority to emit bills of credit must have the same extent as the prohibition. For, if the United States has authority to emit bills of credit, it is an authority by implication, and thus without restriction in the matter of making them legal tender. Whether they shall be made legal tender, or not, rests in the discretion of the body which can cause them to be emitted, — in Congress, as formerly it rested in the Colonial and State Legislatures.

But whence did Congress derive this authority? The repeated decisions sustaining it, alluded to in the opinion just cited, would, undoubtedly, throw some light upon this question. But, unfortunately, I have been unable to find them; and this opinion upon this question throws no light.

In the absence of judicial guidance in this matter, let me follow the next best leader. Mr. Webster believed that Congress had authority to emit bills of credit, and that this authority carried with it the authority to provide a paper currency. And he did not hesitate as to the source of this

* 8 Wall., 552.
† Art. I, sec. 1 .

authority in the Constitution. Two sentences which follow remarks of his upon the coinage power — remarks in which he maintained that the coinage power extended to paper money — will show the exact aspect of his thought. He says : —

"But the Constitution does not stop with this grant of the coinage power to Congress. It expressly prohibits the States from issuing bills of credit." *

Mr. Webster derives this power from a prohibition on the States to do the same thing. He had the Constitution itself with him in this method of interpretation. In that instrument no power prohibited to the States is reserved away from the United States. Powers must be NOT PROHIBITED TO THE STATES in order to be reserved to them or to the people.

Now, between the two constitutional provisions, that relating to bills of credit and that relating to legal tender, there is a historical difference worth noticing.

The prohibition on the several States to make a paper legal tender first appeared, not as an absolute, but as a qualified, prohibition. The prohibition was not, as now, that it should never be done, but that it should not be done without the consent of the National Legislature.† Here is a plain, irresistible implication that the supreme control over this subject was contemplated to be in the Legislature of the United States. If Congress was to have the power to allow the several States, one or more, to make a paper legal tender, then, Congress itself, *a fortiori*, was to have the power to do the same thing. And the making of this prohibition absolute in no way weakens this implication. It simply takes all possibility of interposition in this matter from the several States. It, in no degree, detracts from the implied power in the National Legislature. It intends, on the other hand, to assure that to be absolute, more fully to establish its supremacy.

* Works, vol. iv, p. 336.
† Elliot's Debates, p. 229.

On the other hand, the power to emit bills on the credit of the United States was, as has already been shown, in Congress, under the Constitution of 1777.* Further, it was brought over into the present Constitution so far as to be contained in the draft of that instrument which was reported by the committee to the convention. In convention the words conferring it were stricken out. It having been thus positively rejected from the Constitution as an express power, the practice of the government, and, at length, the opinion of this court, have given it a place in that instrument, by implication.

Is not the implication of an unlimited power in the matter of legal tender at least as easy and obvious? If the power to emit bills of credit comes to the United States from a prohibition on the States to emit such bills, does not also the power to make a paper legal tender come to the United States from the provision in the Constitution that "No State shall" "make anything but gold and silver coin a tender in payment of debts"? As Mr. Webster interpreted the Constitution in respect to bills of credit, and as that instrument has directed its own interpretation, is not the power to make a paper legal tender a power granted to the United States?

* Elliot's Debates, p. 224.

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